In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-832

EDWARD R. JAGNANDAN, et al.,
Petitioners,

vs.

WILLIAM L. GILES, et al.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinions of the lower courts are adequately presented in the petition.

QUESTIONS PRESENTED

1. Whether the Eleventh Amendment to the Constitution as interpreted in *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), permits the recovery of funds paid into the public treasury of a state when those monies had previously been collected pursuant to a valid statute requiring state universities to assess nonresident tuition against all aliens.

2. Whether the Fourteenth Amendment to the Constitution, of its own force and absent enforcement legislation permissible under its §5, constitutes a limitation to the Eleventh Amendment's bar to awarding money judgments against the state in a federal court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eleventh Amendment to the Constitution of the United States:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State or by Citizens or Subjects of any Foreign State."

The Fourteenth Amendment to the Constitution of the United States, in pertinent part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws."
>
> * * *
>
> "Section 5. The Congress shall have power to enforce, by appropriate legislation the provisions of this article."

42 U.S.C. Section 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

At the beginning of the fall semester 1970, Edward R. Jagnandan and Leonard Susil Jagnandan enrolled in Mississippi State University. The Jagnandans were at that time citizens of the Republic of Guyana formally admitted into the United States as aliens with permanent resident classifications. These two individuals, brothers, had lived in West Point, Mississippi, with their father, Reverend W. L. Jagnandan, since 1969 where he was the minister of a Presbyterian Church. Other than alienage, all other requirements for state residency were established. Reverend Jagnandan also entered the University in the spring of 1972 as a candidate for a Master's Degree.

As aliens and as students at a public institution of higher learning in Mississippi, the petitioners were required to pay non-resident tuition. Reverend Jagnandan and his two sons had sought to establish state residency for tuition and fees purposes since 1970, and after fully exhausting their administrative remedy with the University administration, they instigated their federal action.

In the District Court, the Jagnandans challenged the constitutionality of the Mississippi statute and sought re-

imbursement of those added funds paid into the treasury of Mississippi State University as a result of their non-resident status, that sum in the amount of $3,495.00. A three-judge panel decided the cause on submission by counsel, and declared the alien classification violative of the Equal Protection Clause of the Fourteenth Amendment, and enjoined its further enforcement. No appeal was taken from that portion of the lower court's judgment. Based upon this Court's opinion in *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), the Court denied all other relief requested, including that portion concerning repayment of the tuition and fees, stating that such an award was barred by the Eleventh Amendment, 379 F.Supp. 1178, 1187-1189.

On appeal the Circuit Court affirmed. In doing so the Court held that it was clear from statutory and decisional law that the State of Mississippi was the real party in interest even though the named defendants were the governing authority for higher education, the Board of Trustees of State Institutions of Higher Learning, the President of Mississippi State University and its Assistant to the Vice President for Business Affairs. 538 F.2d 1166, 1173-1176. The Court's opinion further stated that Mississippi had not waived its immunity, 538 F.2d 1166, 1176-1178, and that reimbursement of the excess tuition payments was, in fact, barred by the Eleventh Amendment. 538 F.2d 1166, 1178-1182. The appellate panel also rejected the plaintiffs' argument that the Eleventh Amendment does not bar recovery for a Fourteenth Amendment violation. The decision reflects the teachings of *Fitzpatrick v. Bitzer*, ... U.S. ....., 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976), that the Fourteenth Amendment does not, in the absence of legislation adopted pursuant to the Section 5 enabling provision of the Amendment, supersede the prohibitions of the Eleventh Amendment. 538 F.2d 1166, 1182-1186.

ARGUMENT

I

Reimbursement of the Excessive Tuition and Fees Paid by the Petitioners Into the University Treasury Is Foreclosed Because It Is Prohibited by the Eleventh Amendment to the Constitution

Between 1970 and 1973 the three petitioners paid into the treasury of Mississippi State University, a public institution of the State of Mississippi, the sum of $3,495.00 in non-resident fees. This amount was paid in excess of the tuition and fees required by residents of the state because these individuals were, at the time of registration and matriculation at the university, citizens of the Republic of Guyana admitted to this country as permanent residents. The Jagnandans had lived in Mississippi since 1969, and for all purposes were residents, but due to their alien classification, state law required the attendant institution to assess them higher tuition and fees.[1] The main thrust of this appeal is petitioners' attempt to recover the $3,495.00 which was paid into the treasury of Mississippi State. The foundation of their claim of reimbursement is the district court's declaration of unconstitutionality of the statutory alien classification, 379 F.Supp. 1178, stating that the extraction of said funds ran afoul of the Equal Protection Clause of the Constitution. The relief requested would of necessity be derived from the State of Mississippi and its treasury; therefore, it is barred by the Eleventh Amendment to the Constitution.

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1. Miss. Code Annotated §37-103-23 (1972) formerly designated as Mississippi Code §6800-11(11) (1942) states "All aliens are classified as nonresidents".

The record is clear. In each instance of judicial consideration, the university officials were found not personally liable for the excess tuition payments of the petitioners. Initially the three-judge district court stated:

> "Unquestionably, the defendant university officials were under a statutory duty to charge plaintiffs the higher rate of tuition prescribed for nonresidents by the pertinent regulations; defendants were not unilaterally engaging in unconstitutional conduct not sanctioned by state law, or otherwise acting outside obligations imposed upon them by Mississippi statutes." 379 F.Supp. 1178, 1188.

The Court of Appeals agreed. 538 F.2d 1166, 1173, and further found nothing in the record to indicate that the respondents had acted outside their official capacity, *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). Both the district court and the circuit court determined that the respondents had no notice of unconstitutionality with respect to the state statute.

> "Instead the defendant university officials have in good faith endeavored to ccmply with a statute previously unchallenged by anyone." 379 F.Supp. 1178, 1189, *aff'd* 538 F.2d 1166, 1173.

Wood v. Strickland, 420 U.S. 308, 322, 95 S.Ct. 992, 43 L.Ed.2d 214, 225 (1975).

The question then arises of whether this is a suit against the State of Mississippi. It is now a well settled rule that in determining whether a suit is prosecuted against a state "the Court will look behind and through the nominal parties on the record to ascertain who are the real parties to the lawsuit." *In re Ayers*, 123 U.S. 443, 487, 8 S.Ct. 164, 31 L.Ed. 216, 223 (1887). Although the State is not a named party to the proceedings, for

Eleventh Amendment purposes, it is quite sufficient that, in effect, the suit is against the State and recovery will be derived from the State. *Kennecott Copper Corp. v. State Tax Comm.*, 327 U.S. 573, 576-577, 66 S.Ct. 745, 90 L.Ed. 862, 865-866 (1946); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464, 65 S.Ct. 347, 89 L.Ed. 389, 394 (1945); and, *Hagood v. Southern*, 117 U.S. 52, 69, 52 S.Ct. 71, 29 L.Ed. 805, 810 (1886).

Citing *Hamilton Mfg. Co. v. Trustees of the State Colleges in Colo.*, 356 F.2d 599 (10 Cir. 1966), the Court of Appeals found, 538 F.2d 1166, 1174:

> "Under the instant facts it is clear from decisional law that the State of Mississippi is the real party defendant. The district court implicitly recognized this when it stated,
>
> 'Nor is there any question but that the re- funds, if ordered, would not be paid by the defendants from personal funds but would necessarily be a charge upon the state treasury, or at least that portion of the fisc dedicated to higher education. 379 F.Supp. at 1188.' "

The Board of Trustees of State Institutions of Higher Learning and Mississippi State University are statutory creatures of the State. Miss. Const. Art. 8, §213-A, Miss. Code Ann. §§37-101-1, 37-101-15, 37-113-3 (1972). The Mississippi Supreme Court has held the Board of Trustees and the University are educational arms of the State. *Smith v. Doehler Metal Furniture Co.*, 195 Miss. 538, 15 So.2d 421 (1943); *Coleman v. Whipple*, 191 Miss. 287, 2 So.2d 566 (1941). Neither of these governmental entities has waived its sovereign immunity. Mississippi law requires statutory authorization. *Horne v. State Building Comm.*, 233 Miss. 810, 103 So.2d 373 (1958). Such consent must

be clear and specific; and even though the state may have consented to suit in its own courts, such does not imply a waiver in the federal courts. *Edelman v. Jordan*, 415 U.S. 651, 673, 94 S.Ct. 1347, 39 L.Ed.2d 662, 678-679 (1974); *Petty v. Tennessee-Missouri Bridge Comm.*, 359 U.S. 275, 276, 79 S.Ct. 785, 3 L.Ed.2d 804, 807 (1959); *Graves v. Texas Co.*, 298 U.S. 393, 403-404, 56 S.Ct. 818, 80 L.Ed. 1236, 1243 (1936).

The Mississippi Supreme Court spoke specifically to this issue in *State v. Sanders*, 203 Miss. 475, 35 So.2d 529 (1948). There the Court stated:

> "Thus it will be found, . . . that nearly all the cases, wherein the rule of immunity from suit against the state, or a subdivision thereof, has been applied and upheld, are those which demanded a money judgment, and wherein the discharge of the judgment, if obtained, would require an appropriation or an expenditure therefrom, which being legislative in its character is a province exclusively of the political departments of the state." 35 So.2d at 532-533.

The plaintiffs of *Long v. Richardson*, 525 F.2d 74 (6 Cir. 1975) sought the same relief as the Jagnandans here. The Court held that the suit was barred by the Eleventh Amendment since the institution had not clearly waived its immunity.

This Court's opinion in *Vlandis v. Kline*, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973) lends no support to petitioners' petition. The Eleventh Amendment issue was never briefed or argued to the Court and was not discussed in the Court's opinion. *Vlandis* may be placed in the same posture of those prior cases repudiated in *Edelman*, 415 U.S. 651, 670, 39 L.Ed.2d 662, 676-677, fn. 13.

Thus, this suit, though nominally against university officials is in reality against the State of Mississippi. The petitioners readily admit that they seek the recovery of funds paid into the treasury of Mississippi State University, whereby they became part and parcel of public monies. The Jagnandan claims are squarely within the teachings and strictures of *Ford Motor Company v. Department of the Treasury*, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945), which were reaffirmed in *Edelman*, 415 U.S. 651, 667-668, 94 S.Ct. 1347, 39 L.Ed.2d 662, 676:

> "There a taxpayer, who had, under protest paid taxes to the State of Indiana, sought a refund of those taxes from the Indiana state officials who were charged with their collection. The taxpayer claimed that the tax had been imposed in violation of the United States Constitution. The term 'equitable restitution' would seem even more applicable to the relief sought in that case, since the taxpayer had at one time had the money, and paid it over to the state pursuant to all allegedly unconstitutional tax exaction. Yet this Court had no hesitation in holding that the taxpayer's action was a suit against the State, and barred by the Eleventh Amendment. We reach a similar conclusion with respect to the retroactive portion of the relief awarded by the District Court in this case."

In its most recent decision on the Eleventh Amendment, this Court left unquestioned its holding in *Edelman*, stating that in the absence of express legislation to the contrary, retroactive recovery of monies from the State are constitutionally prohibited.

II

In the Absence of Section 5 Enforcement Legislation Mandated by This Court's Opinion in Fitzpatrick, the Prohibition of the Eleventh Amendment Remains in Full Force and Effect for the Purpose of This Federal Action

The petitioners would have this Court accept their premise that the Eleventh Amendment does not bar recovery for a Fourteenth Amendment violation. In other words, petitioners set forth the naked argument that a subsequently adopted Amendment acts as a limitation to an earlier Amendment. The proposition ignores reality. According to Article V, power to amend the Constitution is reserved by Congress or the various state legislatures, not to private litigants in a federal lawsuit. *Leser v. Garnett*, 258 U.S. 130, 137, 42 S.Ct. 217, 66 L.Ed. 505, 511 (1922). Once a proposed addition to that document passes congressional and/or legislative muster,

> "That amendment by lawful proposal and ratification, has become a part of the Constitution, and must be respected and given effect the same as other provisions of that instrument." *Rhode Island v. Palmer*, 253 U.S. 350, 386, 40 S.Ct. 486, 64 L.Ed. 946, 978 (1920).

The reasoning of *Fitzpatrick v. Bitzer*, ... U.S. ....., 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976) clearly indicates the necessity for congressional enactment of §5 legislation to preempt the language of the Eleventh Amendment. That authority is absent here and the Eleventh Amendment strictures operate fully against the demands of the petitioners. For this Court to rule otherwise, it would act

in a legislative capacity and cause a reversal of *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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